STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2004
v ALLEN GAY, Defendant-Appellant.	No. 246720 Wayne Circuit Court LC No. 01-008451-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v COURTNEY M. BOYD, Defendant-Appellant.	No. 246721 Wayne Circuit Court LC No. 01-008450-01

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendants Allen Gay and Courtney Boyd were tried jointly before a single jury. They were each convicted of five counts of first-degree criminal sexual conduct, MCL 750.520b, and sentenced to five concurrent prison terms of ten to thirty years. They both appeal as of right. We affirm.

I. Underlying Facts

Defendants' convictions arise from allegations that, on the afternoon of May 30, 2001, defendants and their three accomplices, Darnell Matthews, Antonio Avery, and De'Angelo Avery, sexually assaulted the thirteen-year-old victim. The victim testified that, as she was walking from her home to a neighborhood gas station, defendants and their accomplices, whom the victim knew from her neighborhood, called out to her from the doorway of the Avery house. According to the victim, the males told her to "[c]ome here," and called her a "stanky bit**" and "a hoe." As the victim continued walking, the five males approached her and began shoving her.

The group eventually pushed her to the Avery house, and Matthews picked her up and carried her into the dining room.

Once inside, the five males punched the victim in her face, arms, and back. The group then pushed her toward the staircase, and two of the five males carried her upstairs. Once upstairs, the group pushed her onto a bed and held her down. Antonio then pulled down her blue jeans and panties, as others held down her arms. She could not see who was restraining her because her eyes were closed and she was crying. Antonio first had sexual intercourse with her by inserting his penis into her vagina, followed by De'Angelo and Darnell in the same manner. After Darnell finished, someone flipped the victim over, and defendant Boyd had sex with her "in her behind." After Boyd finished, someone flipped the victim back over, and Gay had vaginal intercourse with her. According to the victim, the five males threatened to kill her if she told anyone about the incident. The victim put on her pants and ran home.

The victim did not talk to anyone about the incident until her mother confronted her with neighborhood rumors weeks later. The victim indicated that she did not tell anyone previously because she was afraid that she would be killed by the perpetrators and punished by her mother. On June 11, 2001, the victim's mother took her to the police to report the incident and gave the police the blue jeans the victim was wearing during the incident.

A Detroit police deoxyribonucleic acid (DNA) expert testified that the crotch area of the victim's jeans tested positive for both blood and semen. The victim was the major contributor of the DNA in the sample. The test results excluded Gay as a possible contributor of the semen. Out of eight genetic sites, Boyd could not be excluded as a minor contributor of the semen at three of the sites; he could be excluded at the remaining five sites. The expert indicated that "not enough DNA" could have caused the "weak sample." It could not be determined if the semen was from more than one person because there was an insufficient amount of cells to obtain a complete profile of the eight genetic sites.

II. Defendant Gay's Issues in Docket No. 246720

A. Prosecutorial Misconduct

Gay first argues that he was denied a fair trial when the prosecutor impermissibly shifted the burden of proof and vouched for the victim's credibility during rebuttal argument. We disagree.

Because Gay failed to challenge the prosecutor's remarks at trial, this issue is unpreserved and, accordingly, is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). "The test for prosecutorial misconduct is whether a defendant was denied his right to a fair and impartial trial." *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US __; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A prosecutor may not imply that a defendant must prove something or present a reasonable explanation because this tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). In addition, a prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant's guilt. *People v Bahoda*, 448 Mich 261, 276-277, 282-283; 531 NW2d 659 (1995).

Defendant Gay has not demonstrated plain error affecting his substantial rights. To the extent the prosecutor's remarks were improper, they involved only a brief portion of his rebuttal argument, and were not so inflammatory that defendant Gay was prejudiced. Moreover, viewed in context, the challenged remarks were plainly focused on refuting both defendants' attorneys' assertions made during their closing arguments. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Furthermore, any prejudice that may have resulted from these comments could have been cured by a timely instruction. *Schutte*, *supra* at 721.

Moreover, the trial court instructed the jury that defendant Gay did not have to offer any evidence or prove his innocence, that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, that the jurors were the sole judges of the witnesses' credibility, and that the lawyers' comments were not evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), citing *Bahoda*, *supra* at 281. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this claim does not warrant reversal.

B. Sentence

Defendant Gay's final claim is that he is entitled to resentencing because the trial court improperly scored offense variable ("OV") 10. We disagree.

Because the offenses occurred in May 2001, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Pursuant to MCL 769.34(10), "if a sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence *and* the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, ___ Mich ___; ___ NW2d ___ (Docket No. 122271, issued June 29, 2004), slip op at 6 (emphasis added).

Because defendant Gay failed to timely object to the scoring of OV 10, MCR 6.429(C), this issue is not properly before this Court. At sentencing, the sentencing guidelines range was determined to be 108 to 180 months. Defendant Gay's minimum sentence of ten years, i.e., 120 months, is within that range. On appeal, defendant Gay maintains that if OV 10 is properly scored at zero, the applicable sentencing guidelines range would be 81 to 135 months. Thus, even if we accepted the guidelines range represented by defendant Gay, his minimum sentence of ten years would still be within the guidelines range. Accordingly, defendant Gay is not entitled to appeal his sentence on the basis of this unpreserved issue challenging the scoring of OV 10. See MCL 769.34(10); *Kimble*, *supra*.

III. Defendant Boyd's Issues in Docket No. 246721

A. Adjournment[1]

Defendant Boyd first argues that the trial court abused its discretion by granting the prosecution an adjournment "in the midst of" trial, which lasted five months. We disagree.

On March 7, 2002, the first day of trial, codefendant Gay's attorney requested production of the blue jeans that the victim was wearing during the incident after an investigating officer indicated that the jeans had been turned over to the police in June 2001. In August 2001, the jeans were sent to the police crime lab for testing. The prosecution had previously requested any scientific lab reports available from the jeans. None was provided. The investigating officer explained that once the crime lab performs an analysis, a report is sent to the investigating officer. However, she never received a report in this case. After calling the lab on the morning of the second day of trial, the officer was faxed a copy of the analysis on the jeans, and the jeans were returned. According to the report, blood and semen were found on the victim's jeans. The officer explained that, at that point, no DNA analysis had been performed and no blood had been taken from either defendant because, before that day, she was unaware that anything had been found on the jeans.

As a result of the report, the prosecutor requested an adjournment and an order directing the Detroit police to perform an expedited DNA analysis. Defense counsel stated, "At this moment, Judge, I place my objection to the prosecutor's request before the Court." In granting the adjournment to allow DNA testing to be performed, the court stated, in part:

> The jury gets sent home. When everything is right, you bring them back. You prepare a transcript of all the testimony for them. You either reread it to them, or you give them the transcripts, and then you continue trial.
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> * * *
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> [T]his could be exculpatory evidence as well as something that would indict their client. And so I'm going to order the police department, Detroit Police Department to do DNA testing.

On May 17, the parties reconvened and the trial court, after noting that it had checked the jurors' schedules, set a trial date of August 13. Defense counsel did not object.

"This Court reviews the grant or denial of an adjournment for an abuse of discretion." *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause

[1] The terms adjournment and continuance, which were both used by the trial court and the parties, "are essentially the same procedural mechanism." *People v Grace*, 258 Mich App 274, 277 n 1; 671 NW2d 554 (2003), citing MCR 2.503, staff comment (the term "continuance" was uniformly replaced by the term "adjournment").

shown . . ." MCL 768.2. MCR 2.503(C)(2) explains the standard for good cause for an adjournment in the following instance:

> An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

A defendant must show prejudice as a result of the trial court's alleged abuse of discretion in granting or denying an adjournment. *Snider*, *supra* at 421.

The trial court did not abuse its discretion by granting an adjournment to allow DNA testing on the victim's jeans. The defendants were charged with five counts of first-degree criminal sexual conduct. Evidence regarding DNA analysis of semen found on the victim's jeans was material. As the court noted, the evidence could have either exonerated or implicated defendant Boyd. Also, the record does not support a conclusion that the prosecution failed to exercise diligence in this matter. The investigating officer indicated that it was unknown to the police until the second day of the trial that possible evidence, i.e., blood and semen, was found on the jeans. The officer confirmed that, previously, the prosecutor "and other members of [his] office" had contacted the police and requested any scientific evidence.[2] In sum, given the nature and gravity of the case and the evidence involved, it "'promote[d] the cause of justice' to grant an adjournment in this case." See *People v Grace*, 258 Mich App 274, 277; 671 NW2d 554 (2003), quoting MCR 2.503(D)(1). Accordingly, this claim does not warrant reversal.

Within this issue, defendant Boyd argues that the lengthy, five-month adjournment was prejudicial for several reasons. He claims that the case was adjourned with the jurors having a "one-sided view" of the case, the "long delay impaired the jurors' ability to recall events while deliberating," and that "it is reasonable to believe that at least some of the jurors were upset and resentful over their treatment." However, defendant Boyd has not demonstrated that the challenged delay precluded a fair determination of the charges against him. According to the record, when the court set the date for the continuation of trial, defense counsel did not object. Furthermore, when trial resumed, the jurors were provided with the transcript of the testimony of the four witnesses (the victim, her mother, and the two investigating officers) who testified before the adjournment in the event they needed to refresh their memories. Although defendant Boyd claims that the jurors were left with a "one-sided view," the record reflects that defense counsel cross-examined the witnesses at length. We also note that, when trial resumed, defendant Boyd did not present any witnesses. Finally, defendant Boyd's speculative, unsupported claims of prejudice as a result of the *possible* effects that the adjournment had on the jurors fails to present a basis for relief.

Defendant Boyd also claims that he was prejudiced by the court failing to instruct the jury that the prosecution caused the adjournment, and by failing to properly address the jury's

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[2] In a different context, the Court held that due diligence is the attempt to do everything that is *reasonable*, not everything that is possible." See *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988) (emphasis added).

note about missing pages from the transcript. But the record reflects that, in each of these instances, defense counsel either acquiesced or expressed satisfaction with the trial court's actions. Because any objections were waived, there are no errors to review. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

B. Mistrial

Defendant next argues that the trial court abused its discretion by denying his motion for a mistrial, and his alternative request for an adjournment to prepare to cross-examine the DNA expert and to obtain a defense expert to review the DNA evidence.[3] We disagree.

After the March 8, 2002 adjournment, the trial court ordered the parties to come to court on May 24, because the DNA analysis would be faxed that day. The DNA testing results were faxed, but defense counsel left the courtroom before the fax arrived and did not subsequently obtain a copy. After trial resumed on August 13, the DNA expert testified that defendant Boyd could not be excluded as a minor contributor of the semen found on the blue jeans at three out of eight genetic sites. After the direct examination of the expert, defense counsel requested a mistrial or, in the alternative, an adjournment to prepare for cross-examination or to obtain an expert to examine the DNA testing results. Defense counsel maintained that he "never got the report," and that he was told in May that the results were "inconclusive."

The trial court declined to grant a mistrial or an adjournment. The court noted that, because it wanted to insure that all parties received the DNA evidence, it ordered the parties to be in court on May 24, to receive the results, but defense counsel left before the results were faxed. The court concluded that, after learning that the results were available, it was incumbent on the defense to obtain a copy of the report, or advise the court before trial that it did not receive a copy. The court noted the history of the case, and indicated that, when the case was adjourned in March, defense counsel was aware that there would be DNA testimony when trial resumed. The court reiterated that it granted the original adjournment because the evidence could have benefited the defendants, noting that it was positive for Gay and could be interpreted as positive for Boyd.

This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (citation omitted).

As previously indicated, a denial of an adjournment is also reviewed for an abuse of discretion. *Snider, supra* at 421. In this context, "[s]ome factors to be considered include whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the

[3] Although defendant Boyd frames a portion of this issue as the trial court's refusal to appoint an expert for an indigent defendant, he never requested the appointment of an expert. Rather, defense counsel requested "ample time to deal with this [DNA evidence], or at least . . . the chance to find an opposing expert who can examine this."

right, (3) had been negligent, and (4) had requested previous adjournments." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992) (citation omitted). A defendant must also demonstrate prejudice. *Snider, supra* at 421.

The trial court acted within its discretion when it denied defendant Boyd's motion for a mistrial and his request for an adjournment. The record does not support defendant Boyd's suggestion that defense counsel was somehow surprised by testimony regarding DNA testing results and, thus, denied the opportunity to adequately prepare to attack the DNA evidence. As noted by the trial court, defense counsel was aware that there would be some DNA testimony as a result of the March 8 adjournment. Thereafter, defense counsel was aware in May that the DNA testing report had been completed and should have obtained it before August. Nevertheless, giving due regard to the circumstantial nature of the challenged evidence, the record does not demonstrate the necessity for an adjournment or an expert where defendant Boyd was able to adequately present his attack on the DNA evidence through cross-examination. As previously indicated, the expert testified that the sample was "weak" and that defendant Boyd could not be excluded as a minor contributor at only three out of eight genetic sites. In addition, on appeal, defendant Boyd does not suggest what exculpatory evidence a defense expert could have provided. Nor does he indicate what additional questions he was not able to pursue because of the denial of an adjournment. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *Griffin, supra* at 45.

Moreover, defendant Boyd has failed to show that the evidence unfairly prejudiced him. As previously indicated, the victim was familiar with defendant Boyd from the neighborhood, and knew him by his nickname. The victim identified defendant Boyd as one of the five assailants and testified that he had anal intercourse with her while she was being held down. The victim had an ample opportunity to view defendant Boyd before and during the incident. The victim did not waver on her identification of defendant Boyd. Therefore, even without the DNA evidence, there was ample evidence to support defendant Boyd's conviction. In sum, this claim does not warrant reversal.

C. Hearsay

Defendant Boyd's final argument is that the trial court abused its discretion by allowing the victim to testify that "everybody [in the neighborhood] knew about" the sexual assault, because the testimony constituted inadmissible hearsay. We disagree.

The victim testified that, after the incident, she went home and, although two of her cousins were there, she did not tell them or anyone else, including her mother, about the incident. The victim's mother ultimately confronted her because of certain neighborhood rumors, and the victim then told her about the incident. The victim testified that "they was [sic] going around telling everybody that they had sex with [her]." When questioned about why she finally told her mother, the victim responded, "everybody [in the neighborhood] knew about it." Defense counsel objected to the victim testifying about "what everybody . . . knew about." The court overruled the objection, noting that the victim previously testified that someone who questioned her told her that everybody knew.

Because defendant Boyd did not object to the testimony at trial on the same grounds he now raises on appeal, MRE 103(d), this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

Defendant Boyd has failed to demonstrate plain error. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). An out-of-court statement introduced to show its effect on a listener, as opposed to proving the truth of the matter asserted in it, does not constitute hearsay under MRE 801(c). *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994). Such a statement "is not offered for a hearsay purpose because its value does not depend upon the truth of the statement." *People v Lee*, 391 Mich 618, 642; 218 NW2d 655 (1974) (citation omitted).

Here, the challenged statements were not offered to prove that defendant Boyd sexually assaulted the victim or that everybody knew about the incident. Rather, the purpose of the questions and answers was to explain why the victim finally told her mother about the sexual assault, after not telling anyone for weeks. In short, because the statements did not constitute hearsay, defendant Boyd has failed to demonstrate plain error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens